APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 6, 1973
July 16, 1973

Before
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1782 *vs.*

LOUIS GUIDO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 221
THOMAS R. MCMILLEN, *Judge.*

ORDER

The principal question raised by the appeal is whether the evidence was sufficient to support the jury's verdict finding appellant Guido guilty of conspiracy and direct

participation in two heroin transactions, one on October 14, 1970, and the other on January 20, 1971. To answer that question it is necessary to review the facts in some detail.

The indictment resulted from a series of six substantial purchases made by the government informer (Harris) with funds supplied by the government. During the transactions Harris was under almost constant surveillance by several government agents, his telephone conversations were monitored, and some of his direct conversations were overheard by means of a "kel" radio transmitter. In each instance Harris received the heroin from, and paid the purchase price to, Frank Carioscia; his negotiations were either with Frank or his brother, Michael Carioscia. Frank and Michael pleaded guilty to all twelve counts of the indictment. Their participation is not disputed.

Nor is there any dispute about the character, quantity, or value of the heroin. On August 19, 1970, approximately six ounces (185.3 grams) were sold for $6,000; on September 2, 1970, approximately ten ounces (310.2 grams) were sold for $10,000; on October 14, 1970, over eight ounces (254.2 grams) were sold for $8,000; on December 14, 1970, about six ounces (178.53 grams) were sold for $6,000; on January 20, 1971, about 34 ounces (1,066.66 grams) were sold for $32,000; and, on February 23, 1971, Frank and Michael were arrested as they prepared to make delivery of another kilo (1,073.7 grams) for $32,000. In each instance the heroin was in a clear plastic bag which was concealed in a large container. Thus, on August 19, it was in a black sock wrapped in a towel; on September 2, it was in a black sock with no other wrapping; on October 14, in a brown paper bag; and on December 14, in a "package."

Guido was charged with conspiracy (Count 1) and with direct participation in the October (Counts 6 and 7) and January (Counts 10 and 11) transactions. It was the government's theory that Guido was the "source" of the heroin delivery by Frank Carioscia. Since the finding with respect to October is, in part, dependent on the January evidence, we review the later incident first.

The purchase which Harris made in January was larger than the aggregate of his first four purchases. On January 5, he opened negotiations with Michael for the purchase of a kilo of heroin. Michael stated that he could get "eight or ten ounces right now," but with respect to the request for a kilo, he would "check my source and see." (Tr. 66). The next day Michael offered Harris a kilo for $39,000; when Harris said "that was too much" Michael made a phone call and then said that "his man" would provide 39 ounces for $33,000. (Tr. 67). Harris said he would let him know; a week later Harris again met with Michael stating that Harris's principal would be in town on the 18th and "wanted to set it up for the 18th for the kilo." (Tr. 68). Harris again said the price was too high but that he would let Michael know. On the 18th they had another meeting; Harris said his man would be in that night and that he only had $32,000. Michael said ". . . that was okay . . . And he told me to come by the next day and let him know if the fellow had gone in town with the money and that as soon as his brother comes to relieve him from the bar that he was going to go and meet his source and finalize the deal." (Tr. 70). On January 19 Frank Carioscia visited the apartment building where Guido lived shortly after noon and again later in the afternoon. At about 1:00 o'clock p.m. Michael Cari-

oscia left a meeting with Harris and picked up Guido in his car; Michael and Guido then drove to three or four different locations together.[1]

In the meeting between Michael and Harris, early that afternoon, it was agreed that Harris would meet Frank at the Carioscias' fruit stand at 7:45 that evening to close the transaction. During that meeting Harris asked Michael if he was getting the narcotics "from the same people as before." Michael replied that "he was getting the heroin but he had a different source for the cocaine." (Tr. 72).

When Harris and Frank met on the evening of the 19th, Frank said they would have to wait until the next night because there was "too much heat in the neighborhood." (Tr. 75). The next morning, in a telephone conversation, Michael told Harris that he had already seen Frank and the deal was set for 7:30 that night. (Tr. 77-78). At the appointed hour they met at the fruit stand; and, in exchange for the kilo of heroin, Harris gave Frank $32,000 in bills of various denominations; the money was in a Carson Pirie Scott shopping bag with "CPS" imprinted on its side. Frank took the bag and walked to Guido's residence. He was still carrying the "CPS" bag when he entered the apartment building. Ten minutes later Frank left without the bag. He then walked to his car and drove to Turzitti's Lounge, where he joined Guido. Guido gave him a large roll of bills and asked, "How did it go?" Frank answered, "Okay." After Guido bought a round of drinks, Frank drove Guido to Guido's home.

On appeal we must, of course, construe the evidence most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60. So construed, we believe the jury was

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[1] They went to both the Maulella Drug Store, 1160 W. Taylor, and the Galler Drug Company, 651 South Wells.

entitled to conclude that Guido was the "source" to whom Michael referred in his conversations with Harris. This conclusion is supported by the contacts between the Carioscias and Guido on the afternoon of January 19, which presumably led to the postponement of the closing; by the fact the proceeds of sale were delivered to Guido's residence;[2] and by the post-delivery events in Turzitti's Lounge, where Guido was obviously celebrating the successful conclusion of an important transaction, apparently paid Frank for his services, and received advice that everything had gone "Okay." The conclusion that Guido was Michael's "source" makes his statement in January that the source of his heroin was the "same as before" relevant to the October transaction.

The negotiations for that transaction commenced on Thursday, October 8, 1970. On that day Harris asked Frank if he could get a sample of cocaine. Harris explained that it might be necessary "to sell his friend both heroin and cocaine in order to hold him" (Tr. 37). Frank said "he probably could get it by Tuesday or Wednesday of the next week, but to give him a call Saturday; he might have it before." (Tr. 36). They agreed to use the word "chickens" to refer to cocaine and "tomatoes" to refer

[2] We recognize that the residence was an apartment in a multi-unit building and that it is possible that delivery was made to another tenant in the same building. However, Frank was observed entering the first floor of the building where Guido's apartment was located and in testimony offered by the defense, the fact that Frank actually visited the Guido apartment at that time was confirmed. Considering the evidence as a whole, the jury was certainly entitled to conclude that Frank delivered the "CPS" bag to Guido.

to heroin. The record does not indicate any further contact between Harris and Frank until the following Wednesday. On that day (October 14), however, there was significant activity culminating in the delivery of a brown paper bag containing eight ounces of heroin to Harris.

At 9:00 o'clock that morning Guido walked the short distance from his residence to Del's Restaurant where he was employed. A few minutes later he left with Rudolph Piemonte (who was named as a codefendant in counts relating to the October 14 transactions but not in any other counts); Guido and Piemonte walked to Guido's residence. At 9:20 a.m. they left Guido's residence, with Piemonte holding a brown paper bag in his left hand. Guido pointed to the bag; Piemonte then rolled it up tightly and tucked it inside his jacket under his arm. They separated, Guido returning to Del's Restaurant and Piemonte walking to his car.

Piemonte then circled the block a few times and stopped in front of Del's Restaurant; a man at the door shook his head in a negative way and Piemonte drove away. The man then walked to Guido's residence and, after Piemonte drove by, returned to Del's Restaurant followed by Piemonte. Shortly thereafter Piemonte left the restaurant and was seen with Michael Carioscia.

At 11:45 a.m. Harris telephoned Frank who told him he had no "chickens." Harris said he wanted to meet anyway. They arranged to meet at 1:30 p.m.; at that time Harris told Frank "his man" would be in town that evening with between $6,000 and $10,000 to buy heroin at $1,000 per ounce. He said he would know the exact amount by 8:00 o'clock p.m. Frank instructed Harris to call him at

Turzitti's lounge between 8:00 o'clock and 8:30 p.m. and give him the amount. Frank said he would need two hours to get the package ready and therefore arranged to meet Harris in front of the County Hospital at 10:00 o'clock p.m. to complete the transaction.

Frank returned to the fruit stand which he and Michael ran, and then drove to Del's Restaurant where he conversed briefly with Guido in the doorway. After another trip to the fruit stand, he returned to Del's; his car remained parked in front of Del's until 4:45 p.m. and was then observed across from Guido's residence from 5:00 o'clock to 6:30 p.m. Frank had arrived at Turzitti's Lounge by 7:55 p.m. Harris telephoned Frank at Turzitti's at 8:15, stating that he needed "eight pounds" (eight pounds of tomatoes would equal eight ounces of heroin). At 8:30 Frank left Turzitti's and drove to Del's Restaurant. At 9:30 Piemonte left Guido's residence and went to Del's; at 9:33 Piemonte left Del's; at 9:35 Frank left Del's and drove to the Cook County Hospital where he picked up Harris. The two drove around for about four minutes. During that time Frank delivered a brown paper bag containing eight ounces of heroin to Harris in exchange for $8,000.

After dropping Harris off at the Cook County Hospital, Frank drove to his own residence where he stayed for only a few minutes. When he came out, he drove to a location near Piemonte's residence, double parked, and Piemonte entered Frank's car. They drove around the area for about five minutes. When Frank was next seen he was alone.

Reviewing the day's activities in the light of the fact that the preliminary discussion between Harris and Frank

on October 8 contemplated a sale of "tomatoes" and "chickens" on Tuesday or Wednesday of the following week, we are satisfied that the jury may well have concluded that Guido delivered heroin to Piemonte at 9:05 a.m.; that until 11:45 a.m. Piemonte periodically checked at Del's Restaurant where Guido worked, as well as at Guido's residence, and received negative signs; that after Harris called Frank, he communicated with Michael and Guido who made arrangements to get a package together as soon as they knew the proper amount, and arranged to have Piemonte deliver that package to Frank at Del's Restaurant, which, in turn, Frank delivered to Harris for money which he then transferred to Piemonte. No other reasonable explanation for the rather unusual comings and goings of these associates is apparent.

Guido argues that there is no proof that the brown bag in Piemonte's possession at 9:05 a.m. contained heroin because it is unlikely that arrangements were then being made for a sale to Harris who did not telephone Frank until 11:45 a.m. But this argument overlooks the preliminary discussion the preceding week and fails to explain the negative communications to Piemonte as he drove by Del's Restaurant in the morning. Moreover, the contacts between Frank and Piemonte at Del's Restaurant at 9:30 p.m. and in Frank's car after the delivery to Harris persuasively indicate that Piemonte handled both the heroin and the proceeds of sale. Evidence that Guido was the source of the heroin that was transferred from Piemonte to Harris includes the fact that Del's Restaurant was the place Piemonte and Frank met at 9:33 p.m.; the fact that Piemonte had just come from Guido's residence, and the unusual behavior of Piemonte and Guido in front of Guido's apartment at 9:05 a.m. The fact that eight ounces of heroin were actually delivered by Frank in a

brown paper bag is, of course, undeniable. And finally, since we accept the jury's conclusion that Guido was the source of kilo sold in January, Michael's remark that the source was the "same as before" is adequate corroboration to establish the sufficiency of the evidence relating to the October transaction.[3]

We have carefully considered the trial judge's finding of not guilty in the separate trial of Piemonte. As the government points out, a judge may properly find that the evidence is strong enough to submit to a jury even if he is not convinced beyond a reasonable doubt that the defendant is guilty. Of greater significance, however, is the fact that his finding in the Piemonte case need not be consistent with his rulings in the Guido case. The question before us is whether there was enough evidence of Guido's guilt to support the jury's verdict. Our analysis of the record persuades us that it was sufficient. We are also persuaded that there was sufficient evidence of actual or constructive possession by Guido to support the statutory presumption of knowledge of illegal importation. *United States* v. *Holmes,* 452 F.2d 249, 258 (7th Cir. 1971). We find no error in the denial of the motion for a new trial on the ground of newly discovered evidence, or in the claimed violation of the Jencks Act. Finally, although the court's comments that the jury could not see the transcript may have implied, improperly, that the jury could not make any inquiry of the court during these deliberations, that comment certainly was not reversible error.

The judgment on Counts 1, 6, 7, 10, and 11 is affirmed.

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[3] The same source statement was admissible in connection with the October transactions because it was made in furtherance of a conspiracy in which Guido's participation was established by other evidence.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 4, 1973.

Before
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1782 vs.

LOUIS GUIDO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(71 CR 221)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX C

DECISION AND ORDER OF THE TRIAL JUDGE AS TO PIEMONTE

Defendant Rudolph Piemonte was indicted on March 5, 1971 for conspiracy to sell illegally imported narcotic drugs beginning on or about August 1, 1970 (21 U.S.C. §174) and for the illegal sale of 254.25 grams of heroin on October 14, 1970 (26 U.S.C. §4705(a)). His three alleged co-conspirators have either pleaded guilty or have been found guilty, but defendant Piemonte was not present when the other defendants were arrested or tried. He turned himself in shortly after their trial was completed and has now submitted to a belated bench trial. The parties have stipulated to the evidence, most of which was heard at the trial of the other defendants, and have filed thorough briefs in support of their respective positions.

The evidence against Piemonte is almost entirely circumstantial, and his guilt depends on whether he was a member of a conspiracy. For the purpose of deciding this question, we will assume that a conspiracy did exist between the other defendants for a considerable time before and after October 14, 1970, based on the weight of the evidence. The only evidence connecting Piemonte with this conspiracy concerns the activities on October 14, 1970, and his disappearance at the time when the other defendants were arrested on February 23, 1971. Although there is no doubt that Piemonte associated with the conspirators on the date in question, there is no evidence that he participated in any of their rather extensive illegal activities on any other dates shown in the record (with the exception of January 21, 1971 concerning which date there exists a reasonable doubt that he was in the United States at all).

On October 14, Piemonte first joined the defendant Guido at the latter's place of employment, Del's Restaurant, at about 9 a.m. They left almost immediately and walked to Guido's apartment a few blocks away. They came out at about 9:20 a.m. and Piemonte had a small brown paper bag in his hand. A surveillance agent testified that Guido pointed to the bag, whereupon Piemonte tucked it under his arm inside his jacket. A sale of heroin in a brown paper bag was consummated by Franklin Carioscia, a co-conspirator, that night at about 10 p.m., but no brown paper bag made an appearance in the meantime.

Piemonte and Guido separated that morning without further incident, Piemonte returning to the vicinity of his home nearby. At 9:40 a.m. he was seen driving his own car with defendant Michael Carioscia. After driving around the vicinity of Del's restaurant, Piemonte went in and out twice for brief intervals and then drove away with Michael Carioscia. No one saw any brown bag or any other items change hands and no conversations were overheard. There is, in short, no evidence of what transpired at these brief meetings between Piemonte and Michael Carioscia or Piemonte and Guido.

That afternoon at about 2:30 p.m. the government's undercover agent arranged to buy heroin from Franklin Carioscia at 8 p.m. At 7:55 Franklin telephoned the agent, postponed the closing to 10 p.m., and went to Del's restaurant. At 9:30 p.m. Piemonte went into the restaurant for a few minutes and then went home. Franklin then left the restaurant and delivered heroin to the government agent in a brown paper bag at the appointed time.

After this sale, Franklin returned to the vicinity of Piemonte's home, picked him up, drove around the block, and then dropped him off. Franklin and Michael Cari-

oscia, incidentally, are brothers, but they had no common participation in the events of October 14, 1970 except that Michael rode around with Piemonte in the morning and Franklin met with him in the evening.

The purchase money which Franklin had received for the heroin that night was never recovered. The government apparently infers that Piemonte received money from Franklin after the sale and had previously given the brown paper bag of heroin to him at Del's restaurant at about 9:30 p.m. The difficulty with these assumptions is that they leave too much to speculation. There is no logical reasons for Piemonte to get heroin from Guido at 9:20 a.m. and carry it around all day for a sale which was arranged at 2:30 p.m. to be consummated that night. And there is no apparent reason for Piemonte to return to Guido's place of employment at 9:30 p.m., if he had received heroin from him at 9:20 a.m. If Piemonte did in fact have the heroin all day, as the government apparently contends, there is no reason why Franklin would postpone the sale from 8 p.m. to 10 p.m. in order to "put the package together," as he told the buyer.

It can be seen from the foregoing that the government's case against Piemonte boils down to inferring guilt by association. It is true that his association with a proven conspiracy on the date of an illegal sale is suspicious and difficult to account for rationally. But on the other hand he should not be convicted without some hard evidence that he knowingly participated in the conspiracy and sale, and the evidence does not convince me of this beyond a reasonable doubt.

The doubt arises from several elements, in addition to those already mentioned. First, there is no evidence that

Piemonte ever possessed any heroin or any money from the sale of heroin, although proof of this is not essential. No direct connection has been established between a brown bag seen in his hand at 9:20 a.m. and one containing heroin which was delivered by Franklin Carioscia at 10 p.m. that night. If Piemonte obtained heroin from Guido at 9:20 a.m., there would be no conspiratorial reason for him to go back to Guido's place of employment at 9:40 p.m., with Michael Carioscia and again at 9:30 p.m., with Franklin Carioscia. All of these comings and goings are difficult to relate rationally to a transaction that occurred at 10 p.m. that night. We suspect that, if Piemonte was a member of the conspiracy and did get a brown bag of heroin from Guido at 9:20 a.m., it was sold to someone other than a government agent long before 10 p.m. and the evidence of such a transaction and hence the contents of the brown bag is entirely lacking. Piemonte therefore was not tied into the transaction alleged in the indictment beyond a reasonable doubt, and there is no other evidence connecting him with the conspiracy other than mere association with its members.

The government likewise leans heavily on the fact that Piemonte could not be found when the other conspirators were arrested on February 23, 1971 and did not turn up until after they had been found guilty more than a year later. We agree that evidence of flight tends to confirm guilt, at least when there is independent evidence of that guilt. In this case, however, we have found such evidence to be deficient. Without more of a circumstantial case than has been found in this case, disappearance in and of itself has no foundation on which to erect an inference of guilt.

Furthermore Piemonte's disappearance is too ambiguous to convict him. He left behind no incriminating evidence, other than the arrest of his friends. He may well have been afraid to stand trial with them, knowing something about their activities and the circumstances of their arrest. His "flight" therefore can support the inference of innocence as well as the inference of guilt and does not bolster the government's case in chief.

In conclusion, although Piemonte's activities on October 14, 1970 were sufficient to indict him and to cause him to stand trial, the evidence and reasonable inferences therefrom fall far short of proving him guilty beyond a reasonable doubt. This conclusion, however, casts no doubt on the guilt of the other defendants.

Rudolph Piemonte is therefore found not guilty of the charges in Counts I, VI, and VII of the Indictment.

Enter:

Thomas R. McMillen
Judge, U.S. District Court

APPENDIX D

THE EVIDENCE IN THE CASE

Testimony of Dave Harris, Jr.

Dave Harris, Jr., who was working for the Bureau of Narcotics, was paid by the agents whenever he needed money (Tr. 125), which finally totalled the sum of $5,500 between July, 1970 and February 23, 1971 (A. 12).

He first met Franklin Carioscia in 1961 (A. 5). He then went looking for Frank in July, 1970, and found him on Lexington near Loomis Street in Chicago. Frank told him that he had a food store at 810 South Loomis Street; they agreed to meet some future day.

They met again on August 8, 1970, when they had a discussion in which Frank told Harris he could sell him heroin for $1,000 an ounce (A. 5). Harris also talked with Michael Carioscia in front of the fruit store. Michael asked if he could use cocaine.

He saw Michael again at the fruit store on August 11, 1970 and asked Michael to get him $6,000 worth of heroin (A. 5). Michael told him that Frank would be able to take care of him on August 19. He talked to Michael again on August 14; Michael told him that Frank said to give Harris whatever he (Harris) wanted (A. 6). On August 17 Harris went to the fruit store; Frank told Harris to meet him on August 19.

They met that date in front of the fruit store, where Frank got in Harris' car and they drove a few blocks away. Harris gave Frank $6,000 which he had previously obtained from the narcotic agents and Frank gave him a

towel, which he later turned over to Agent Aurielo (A. 6). (The towel was later shown to contain approximately 6 ounces of heroin).

Harris and Frank met again on September 1, 1970, and they arranged that Frank would sell Harris 11 ounces of heroin for $10,000. On September 2, Harris obtained the money from the agents and met Frank in front of the fruit store, from where they drove away. While in the car, Harris gave Frank the $10,000 and Frank gave Harris a black sock (later shown to contain heroin). (A. 7).

On neither August 19 or September 2, did Frank give Harris an order form for use in the transfer of the narcotics; nor did Harris have an order form for that purpose (A. 7).

On October 8, 1970 they talked in person about another sale. Harris then talked with Frank on the telephone on October 14. They met at 1:30 p.m. on October 14, and Harris told Frank that he would only have $6,000. Frank told him he would pick Harris up in front of the Cook County Hospital. They had a telephone conversation on October 14 between 8:00 and 8:30 p.m., during which Harris said that he would bring $8,000 worth of heroin. He was given the money by narcotic agents. Frank picked up Harris who was standing in front of the County Hospital. They drove a few blocks away and Harris gave Frank $8,000 for 9 ounces of heroin. He did not present an order form for the transfer of narcotics; neither did he obtain a form from Frank (A. 8).

On December 4, 1970, Harris went to Tony's Lounge in the 1300 block on South Laramie, Cicero, Illinois, and told Michael he wanted $6,000 worth of heroin (A. 8). Michael told him to meet him that night, at which time Michael gave

him narcotics and he gave Michael $6,000, which he had previously received from the agents (A. 8). Neither of them had an order form for the transaction (A. 8).

On January 5, 1971, he met Michael and asked for a kilo of heroin. Michael said, "Things are tight right now." Harris then met with Michael the next day, January 6, and Michael told him he could sell a kilo for $35,000. They negotiated the price to $33,000 (A. 9). Harris asked Michael about cocaine; Michael said he could provide cocaine for about $1,000 an ounce (A. 9). They talked on the telephone on January 13, Harris said he would be able to make the purchase on January 18, but that the price was too high (A. 9).

He again met with Michael at Tony's Lounge at 1333 South Laramie, Cicero, on the afternoon of January 18, 1971, and said that he would only have $32,000. Michael said that that was okay (A. 9). He again met Michael at Tony's Lounge on the afternoon of January 19, 1971. Michael told him to go down to the fruit store at 7:45 p.m., and that he would get the kilo from Frank (A. 10).

Harris was asked if he recalled any other conversation he had with Michael and he said, "I don't remember." The prosecutor put it directly:

> "Did you have some conversation with respect to Mr. Carioscia's sources?"

Harris replied that he asked Carioscia if he was getting it from the same people as before. Carioscia "said he was getting the heroin, but he had a different source for the cocaine." (A. 10).

On the evening of January 19, 1971, Harris received $32,000 from the narcotic agents and drove to 810 South Loomis where Frank got in his car. Frank told him that

they were not going to do anything that night because, "There is too much heat in the neighborhood." Frank inquired whether Harris had the money; Harris said he did. Whereupon Frank said, "I would sure like to do it, but there is too much heat here tonight." (A. 11). Frank told him to go to Tony's Lounge the next day and see Michael for instructions (A. 11).

On January 20, 1971, he went to see Michael at Tony's Lounge; Michael told him the deal was set for 7:30 p.m. That evening, he again obtained the $32,000 from agent Aurielo, which money was put in a Carson Pirie shopping bag (A. 11). He then drove to the fruit store on South Loomis Street, where Frank got in his car and they drove north on Loomis to Flournoy Street. Frank gave him a package which contained narcotics, and he gave Frank the Carson Pirie shopping bag with the money. Neither had an order for the transaction (A. 11).

On February 23, 1971, he went to Tony's Lounge on Laramie Street and talked with Michael. They drove together in a car on the northside of Chicago to St. Louis Avenue near the Kennedy Expressway, where they met Frank. Frank would not sell him any narcotics for the $6,000, which Harris had, but told him that he would sell him 33 ounces for $32,000, and that he would go to the store and wait (A. 11). (Frank was later arrested in front of the fruit store by narcotic agents in the possession of heroin A. 15).

On cross-examination, Harris was certain that the transaction on January 20, 1971, took place at 8:00 p.m. when Frank got out of his car at Loomis and Flournoy Streets. He knew, because he checked the time by looking at his clock (A. 12).

Testimony of Narcotics Agents

Various narcotic agents testified to having listened to telephone conversations between Harris and the Carioscia brothers on various dates and to having listened to Harris' conversations with Frank by means of a Kel set transmitter placed on Harris when Harris went to meet Frank Carcioscia.

The events of October 14, 1970 as to Counts 6 and 7

The first date about which Guido's name was mentioned is agent Frank Cruz' testimony that at about 9:00 a.m., on October 14, 1970, he saw Guido leave the address where Guido lived at 633 South Laflin Street, Chicago, and walk south on Laflin to Del's Restaurant at 1459 Lexington, one block south of where petitioner lived. Del's Restaurant was where defendant Guido was employed (A. 17). About five minutes later, agent Cruz saw Rudolph Piemonte enter the restaurant, and a few moments later, leave with Guido and walk toward 633 South Laflin Street (A. 17-18). As Guido and Piemonte were walking, they were talking and waving their arms (A. 17-18). They entered 633 South Laflin, and at about 9:20 a.m., came out of the entranceway. Piemonte was carrying a brown paper bag in his left hand. They were still engaged in conversation. Guido pointed to the brown bag; then Piemonte rolled the brown paper bag up and placed it under his arm. (A. 18). Piemonte walked east on Flournoy Street to about 1437 West Flournoy Street (where his mother lived)* and Guido went back to Del's Restaurant (A. 18).

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* Piemonte lived at 1448 Flournoy; his mother and brother lived across the street, at 1447 Flournoy (A. 19).

Then Piemonte is seen at 9:40 a.m. in the company of Michael Carioscia. Agent Cruz saw Piemonte and Michael Carioscia drive to Del's Restaurant (A. 18).

Cruz testified that when he, supervising agent Janet, and four other agents arrested Guido on the early morning of February 24, 1971, none of the agents searched the house (A. 19). None of the government's pre-recorded or marked money or narcotics was ever found either in Guido's house or on his person (A. 29).

Agent Rusycki testified that on October 14, 1970, at about 3:00 p.m., he saw Frank Carioscia leave his fruit store at 810 South Loomis Street and drive to Del's Restaurant at Laflin and Lexington Streets. He happened to see Frank engaged in conversation with Guido in the doorway at Del's; then Frank drove back to his fruit store. About 3:30 p.m., Frank drove his car and parked near Del's Restaurant, and then entered it. At 5:00 p.m., he noticed Frank's car parked across the street from 633 South Laflin Street; he watched the car until 6:30 p.m. (A. 20). He had no idea what Frank was doing in the fruit store; nor did he have any idea what Frank was doing inside Del's Restaurant (A. 20). The apartment building at 633 South Laflin Street was a three story building with at least 12 apartments (A. 20).

Agent Young testified that at about 9:30 p.m. on October 14, 1970, he saw Rudolph Piemonte go into Del's Restaurant, come out about three minutes later, and walk north on Laflin Street to Flournoy Street, where he turned east (A. 23), toward his home. (A. 23). About 10 minutes later, Frank Carioscia came out of Del's Restaurant; and at about 10:30 p.m., he saw Frank go into Whitey's tavern, located on the west side of Laflin and Lexington Streets. (A. 23).

Agent Janet testified that on October 14, 1970, he saw Frank Carioscia leave Turzitti's Tavern at about 8:30 p.m. and drive away (A. 25). At about 9:30 p.m., he saw Rudolph Piemonte leave 633 South Laflin Street and walk to Del's Lounge. About three minutes later, he saw Piemonte walk back to Laflin Street to Flournoy and turn east on Flournoy (A. 25-26).

The events of January 19 and 20, 1971, as to Counts 10 and 11

January 19, 1971

Agent Aurielo testified he saw Harris go into Tony's Lounge, on South Laramie Avenue, where Michael Carioscia worked, at about 1:00 p.m. on January 19, 1971, and depart about five minutes later (A. 13). At about 1:40 p.m., Aurielo saw Michael Carioscia and Guido leave Del's Restaurant, enter Michael's car and drive to a drug store at Racine and Taylor Streets, where they went in and returned a few minutes later (A. 14). Michael then drove Guido to Loomis and Taylor Streets, where they parked, left the car, returned a few minutes later and drove to Frank's fruit store, 810 South Loomis Street, where they double parked (A. 14).

Agent Young had testified that earlier, at about noon or 12:30 p.m., on January 19, 1971, he saw Frank Carioscia drive his car to the front of 633 South Laflin Street and go into the building at that address; Frank came out about ten minutes later and drove away (A. 23). At about 7:20 p.m. on January 19, 1971, he saw Frank enter Whitey's Lounge; and also immediately he saw Rudolph Piemonte enter the lounge. At about 7:40 p.m., Frank left the tavern and drove to his store at 810 South Loomis Street. He later saw Frank get in Harris' car and saw them drive around (A. 23).

Agent Janet testified that on January 19, 1971, at about 1:00 p.m., he saw Harris go into Tony's Lounge on South Laramie Street and come out about five minutes later. He then saw Michael Carioscia come out of the tavern and drive away. He later saw Michael in the vicinity of Flournoy and Laflin Streets, when Guido was in Michael's car. They drove to a drugstore at Taylor and Racine Streets, which store they entered at about 1:45 p.m., and came out at about 1:50 p.m. (A. 26-27). They then drove to Frank's fruit store at 810 South Loomis Street, where another man got into the car and Michael drove to 651 South Wells Street, where the Galler drug company was located. The unidentified man went into the drug company entrance, came out about a minute or so later, and got back in the car, which then was driven to the area of Lexington and Laflin Streets (A. 26-27). About a half hour later, he saw Guido as a passenger in a blue truck with an unidentified driver. The truck drove around the block for about ten or fifteen minutes, and then Guido left the truck and went into Del's Lounge (A. 27). Later, that afternoon, he saw Guido enter his residence. Some time after 8:00 p.m., he saw Frank Carioscia drive away from 633 Laflin Street to his own residence at 700 Ada Street (A. 27).

January 20, 1971

This is the evening when Harris purchased $32,000 worth of narcotics from Frank Carioscia—at about 8:00 p.m. according to Harris (A. 12), and at about 7:30 p.m. according to agent Aurielo (A. 15). Agent Aurielo testified that when Frank Carioscia alighted from Harris' car at Loomis and Flournoy Streets, Frank was carrying the white shopping bag which Aurielo had previously given to Harris. Frank left Harris' car at about 7:32 or 7:33 p.m. (A. 15).

At about 7:55 p.m., he saw Frank come out of the Guido residence; Frank was not carrying any bag (A. 15). Frank walked to Lexington and Loomis Street where he entered his car and drove to Turzitti's Lounge at 1121 South Racine Street. At about 8 p.m., he saw Frank Carioscia, Guido, and Linda Brewer leave the tavern. Frank drove Guido back to Guido's residence and Guido entered it. Frank went to Whitey's Lounge and entered the tavern (A. 15).

There were about fifteen agents in or about the vicinity conducting the surveillance (A. 16). As Frank Carioscia walked away from Harris' car south on Loomis Street towards Lexington, he was walking away from Guido's house (A. 16). The most direct route to Guido's house would be on Flournoy to Laflin (A. 16).

None of the agents went into Guido's house on the night of January 20, 1971 to see if the $32,000 was there (A. 16).

Agent Young testified that at about 7:45 p.m. on January 20, 1971, he saw Frank Carioscia walk north on Laflin from Lexington carrying a white bag with initials "CPS" thereon, and that Frank went into the 633 South Laflin Street address at about 7:45 p.m. and exited about ten minutes later, without anything in his hands (A. 24). He did not see Frank go into or come out of any particular apartment when Frank went into the areaway at 633 South Laflin Street. There were probably a dozen apartments at that address (A. 25).

Supervising agent Janet testified that on January 20, 1971, he saw Frank Carioscia in Harris' car at about 7:30 or 7:35 p.m. on Loomis Street near Flournoy. Frank got

out of Harris' car carrying a Carson's shopping bag; he walked south on Loomis, then turned west on Lexington, out of the agent's view (A. 28). Janet lost view of Frank Carioscia for a period of time (A. 28). He searched for Frank, and later found him again on Lexington between Loomis and Laflin, rounding the corner of Lexington with the bag. He saw Carioscia walk north on Laflin Street and stand in front of Guido's door at 633 South Laflin Street (A. 28). Ten minutes later, Frank came out of that address without a bag, and walked south on Laflin Street. At about 8:45 p.m., he saw Frank drop Guido off at Guido's residence; then Frank went into Whitey's tavern (A. 29).

Frank's father, Anthony Carioscia, lived in the 1400 block of Lexington Street between Loomis and Laflin Streets. Frank could have stopped in the building where his father lived, as he walked on Lexington from Loomis to Laflin Street (A. 29). As a matter of fact, Frank could have gone into any of the buildings on Lexington Street, between Laflin and Loomis Streets (A. 30). It was eight or ten minutes after he lost sight of Frank as Frank walked west on Lexington Street before he again saw Frank rounding the corner at Lexington and Laflin Streets (A. 30). Frank "may well have entered an alley and remained in a gangway or entered a building. I do not know." (A. 30). Agent Janet did not know what Frank was doing in the eight or ten minutes when Frank was out of view (A. 30).

Events In Turzitti's Lounge On The Night Of January 20, 1971.

When Frank Carioscia was seen to have gone to Guido's apartment at about 7:45 p.m. on January 20, 1971, agents testified that Frank left the Guido residence area at about

7:55 p.m., walked to his car on Loomis, south of Lexington Street, and then drove to Turzitti's Lounge at 1121 South Racine Avenue arriving there about 8:10 p.m. (A. 35). Agent Koepp followed Frank into the lounge, and saw Guido sitting at the bar with two females. Koepp took a seat to the east of Guido and the girls. Agent Biss then came in and took a seat to the east of Koepp. Then Frank took a seat next to one of the girls, Linda Brewer, who was sitting to the west of Guido. He saw Guido give some money to Frank Carioscia. Guido bought drinks for Frank and the two girls with a $20 bill which Guido took from a large roll of bills from his left pocket. The money he gave to Frank came from Guido's right pocket (A. 35-36).

On cross-examination, agent Koepp testified he made notes of his observations, but destroyed them after he related the contents of his notes to Agent McNamara. Shown McNamara's reports, it nowhere appeared that Koepp was in Turzitti's Lounge (A. 36). There were empty seats to the east of Guido and empty seats to his west. There might have been music going on, he did not recall (A. 37).

Agent Thomas Thompson testified he entered Turzitti's Bar at about 8:10 p.m. and saw Guido sitting in the bar with two young ladies and saw Frank Carioscia sitting at the rear of the bar talking with a man. Thompson sat down at the bar six or seven feet to the west of Guido and ordered a beer. Then Frank came and sat down two stools to the left of Thompson and to the right of Guido. Guido took out a large roll of bills from his right hand pocket and gave it to Carioscia. About a minute later, Carioscia walked to where Guido was sitting; he heard Guido say to Carioscia, "How did it go?", to which Carioscia replied, "Okay" (A. 39).

On cross examination, agent Thompson testified he did not take notes; neither did he tell anybody of his observations with respect to the events he described (A. 40).

Evidence On Behalf Of Defendant

Sam Mancino, the bartender at Turzitti's tavern testified the tavern always had a juke box and was playing mostly at night, and that there was no reason why the juke box would not be playing on January 20, 1971. There were ten stools in the place (A. 44).

Mrs. Linda Brewer testified she was with Mr. Guido and his niece in Turzitti's tavern on a night in January, 1971. She did not see Guido give a roll of bills to Frank Carioscia; nor did she hear Guido say to Frank, "How did it go?"; or Frank answer, "Okay". Guido drank quite heavily that night; he had twelve or thirteen drinks (A. 44).

Mrs. Ann Garippo, niece of Guido, testified she lived in a flat upstairs of the tavern and that on January 20, 1971, she saw her uncle with Mrs. Brewer and with Frank Carioscia between 8:00 p.m. and 8:30 p.m. She never saw her uncle give Frank a large wad of bills. The juke box was playing music. She never heard Guido say to Frank, "How did it go?", or Frank answer, "Okay". She was near Guido all the time she was there (A. 44-45).

Miss Elaine Schain testified she was a substitute school teacher and was a baby sitter for the Guidos who lived at 633 South Laflin Street where there were fifteen or sixteen apartments located. She was in the apartment on Wednesday, January 20, 1971, having arrived at 6:15 or 6:30 p.m.; she remained for several hours. The Guidos had a child, about eleven months old. During the evening, Frank Carioscia came to the apartment. She knew him, in-

asmuch as she lived at 732 South Loomis Street, a block from Frank's fruit store at 810 South Loomis, where she shopped. She never saw Frank with a shopping bag similar to Govt's Exhibit 9, on January 20, 1971. When Frank came to the apartment, he brought groceries. He carried them in a brown paper bag or a box—she could not remember which. Frank had delivered groceries there on other occasions. On this night, he delivered fruits and vegetables and stayed about five minutes (A. 45-46).

Mrs. Mary Guido, defendant's wife, testified that their child was born on February 15, 1970, and that they employed Elaine Schain as a babysitter. There were at least sixteen apartments in the unit known as the Circle Apartments, at 633 South Laflin Street. She and defendant occupied Apartment 1 in the unit. Guido was home when Miss Schain came to the apartment, but then left about 7:00 p.m., or maybe later. Frank Carioscia came to the apartment close to 8:00 p.m. on January 20, 1971. He did not come in with any Carson, Pirie, Scott shopping bag, nor did he bring to her apartment the sum of $32,000. When her husband came home that night, he was intoxicated. Guido was employed at Del's Tap and Restaurant during 1970 and January, 1971. The restaurant was at 1459 West Lexington Street, one block from her residence. Frank would deliver groceries to her apartment because she was in the habit of calling the produce store two or three times a day and she would order the groceries from Frank, his father, or from another man who works there (A. 46-47).

The trial court's comments at the close of the government's case and at the close of all the evidence.

When the government offered into evidence the narcotics received by Harris from Frank Carioscia on August 19, 1970, the court asked the government, "How do you get Mr. Guido into a conspiracy on August 19?", to which the government replied that Harris had asked Michael Carioscia on January 18, 1972 if he was getting heroin and cocaine from the same sources and that Michael said, he "was getting the heroin, but he had a different source for the cocaine" (A. 42). The court replied, "That source could be anybody . . . How do you tie Mr. Guido into being the source?" (A. 42). The government responded that the only thing that tied Guido "into being the source" is "where Guido was seen with respect to the acts as they occurred" (A. 42). The court stated that he did not know why the government went into the earlier (August, September and December transactions) because "it is a rather tenuous connection" (A. 42).

The court was "bothered" about evidence of transactions earlier than October 14, 1970 (A. 42). The court stated that it could "not see any way of correcting it short of a new trial. I'm reluctant to start a new trial on this case at this juncture . . . I think I will rule that there is enough of a tenuous connection and to let them stand. If I am wrong, I will just have to decide that after the close of all the evidence or after the jury has made its verdict. I would like to give this some further thought. I am not precluding this point, but I am precluding this at this stage, because I do not know how to remedy it." (A. 43).

Defense moved for a mistrial (A. 43).

The court stated, "That is what I might have to do if I keep these exhibits out because they might be so prejudicial having been brought into the case that it is not fair to let it go to the jury" (A. 43).

However, all the narcotic exhibits were admitted into evidence, over objections (A. 43).

Instructions of the court precluding the jury from requesting assistance about the evidence.

Just before the court sent the jury to deliberate upon their verdict, it advised the jury: "Now, ladies and gentlemen, the court will be here through your deliberations. I might mention that occasionally juries ask if they can see a transcript of testimony because of the court reporter's presence. That I can answer for you in advance. It is not permitted. But if you have any other problems which require a response by the court, you can submit them in writing through the U.S. Marshal (A. 49).

Defendant moved for a mistrial (A. 49).

The question posed by the jury.

The jury commenced deliberations at 3:30 p.m. (A. 49). At 6:00 p.m., the jury sent to the court a question in writing, as follows: "Are we to construe Count 1 of the indictment to begin on October 14, 1970 for Louis Guido as opposed to August 1, 1970 as stated in the first paragraph of Count 1 of the indictment?" (A. 49).

The court advised the jury in writing, "Yes." (A. 49).

The verdict was returned at 8:15 p.m. (A. 49).